2.4 Over-Arching Theme #4—Legislative Change Packet

As the various laws associated with procurement and contracting activities were analyzed, some recommendations for change emerged. Just as policies have evolved, laws have been created over many years, resulting in some inconsistencies and lack of clarity. Legislative change can be approached in numerous ways. One method relies on sweeping legislative change while another approach builds upon incremental legislative change focusing on specific areas.

The project team recommends that specific areas in law be addressed by focusing on correcting errors and/or omissions and adding clarity where needed. The following findings most predominantly fall under the "Legislative Change Packet" theme.

2.4.1 Statutory References to the Department of Information Technology (DOIT)

- **FOAM Reference: Finding #3**

Findings

With the "sun setting" of DOIT on July 1, 2002, in accordance with Government Code §11700 et seq repealed by Statutes of 1999 (AB 1686, Dutra) Chapter 873, the Department of Information Technology (DOIT) no longer exists. Throughout the PCC, Chapter 3 (§12100-12113), references to DOIT create several inconsistencies in the PCC.

In keeping with the intent of PCC Chapter 3 of Part 2 of Division 2, several references state that DOIT and the DGS are jointly responsible to create and coordinate policies and procedures for the acquisition of information technology goods and services. However, Chapter 3 of Part 2 of Division 2 also draws a further distinction between these joint responsibilities when it says that DOIT has the final authority over "any general policy", and DGS has the final authority over the "determination of any procedures."

This appears to put the responsibility for "policy" and "procedure" in conflict:

- Section 12102. "The Department of Information Technology and the Department of General Services

shall maintain, in the State Administrative Manual, policies and procedures governing the acquisition and disposal of information technology goods and services."

- Section 12105. "The Department of Information Technology shall have the final authority in the determination of any general policy and the Department of General Services shall have the final authority in the determination of any procedures…."

This separation of authority does not make any distinction between "general policy" and "procedures." In addition, this contradicts the DGS responsibility to develop and maintain procurement policies *and* procedures for the State as set forth in Government Code §14600 et seq.

Executive Order D-59-02 assigns the DOIT roles and responsibilities to the Department of Finance (DOF). Subsequently, the DOF issued Management Memo 02-20 detailing the changes to policy, instructions, and guidelines for statewide IT policy. The memo stated the DOF intention to maintain the SAM and SIMM as the "single location for statewide IT policy, instructions, and guidelines." Additionally, DOF clarified the delineation of DGS and DOIT responsibilities in the subject area of IT procurements. DOF has assumed responsibility for all statewide IT policy in SAM and the corresponding instructions and guidelines in SIMM; DGS has responsibility for all goods and services procurements including IT goods and services, and requires the use of ITPPs for IT procurements.

Recommendations

- To clearly define the authority, roles, and responsibilities for procurement of IT goods and services, the legislature should pass such legislation as necessary to update and clarify the Public Contract Code and Government Code, and assign the DOIT roles and responsibilities to another agency.
- Since DGS is responsible for developing policies and procedures for the purchase of goods, it should also be responsible for developing policies and procedures for the purchase of IT goods and services. Coordination with other control agencies such as DOF would be necessary, but the final authority for all purchasing policies and procedures should lie with DGS. Even though MM 02-20 clearly states that purchasing

policy is DGS' area, an effort should be made to work through the legislature to change the statutes to grant DGS the authority for development of statewide IT purchasing policy and procedure.

2.4.2 Follow-on Work

- **FOAM Reference: Finding #12**

Findings

PCC §10365.5(a) states: "No person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract." With the passing of SB 1467 (D-Bowen) effective July 1, 2003, PCC §10365.5 applies not only to consulting services, but also to the acquisition of information technology (IT) goods and services.

The purpose of this law is to address the unfair advantage and bias that can occur through an organizational conflict of interest (OCI) caused by the position of the consultant in an advisory role. The OCI most often occurs when the consultant is involved in preparing specifications or statements of work that will be used in a subsequent solicitation document and then is allowed to submit a proposal for the solicitation.

This law is overly broad and simplistic to the point of being counter to the State's best interest and stated intentions for competition in purchasing. The conflict of interest issue for consultants lies in their position as advisors preparing specific specifications, making specific recommendations, or having access to non-public information with regard to some future solicitation. Allowing consultants to bid on solicitations containing the specifications that they produce could cause bias in producing the specifications, with a built-in advantage to the consultant. It can also cause an unfair competitive advantage by virtue of the consultant having been exposed to non-public information with a material relevance to the solicitation.

As written, the law restricts consultants from performing any future work that is connected in any general way to the end deliverable of their awarded contract. In doing this, the law is counter to the legislative intent that the State foster competition and participation in public contracting. The generalized language of the law prohibits consultants from bidding in cases where no reasonable opportunity for conflict of interest or bias exists. To compound the problem, each situation is decided on a case-by-case basis.

The breadth of the law is restrictive in nature, causing the State's buyers to ignore it or implement it according to their own interpretation. The following real life examples illustrate the varying degrees of the interpretation of the law:

- Writing non-specific, over-arching consulting contracts in an attempt to allow for any and every possible follow-on task circumvents the intent of the law
- Overly restricting consultants who advise senior management from doing any other work in the department
- Allowing consultants to bid on anything so long as they did not physically write the FSR or RFP
- Combining advisory, requirements, design, integration, and implementation roles under one contract to subvert the law at the cost of creating a non-specific contract giving the firm "carte blanc" to write the requirements, as well as design, integrate, and implement the system

In addition to the rule restricting follow-on contracting being overly broad, we find that the application of the rule is overly narrow. The OCI that can exist in consulting services contracts may also exist in other areas such as goods and IT goods and services contracts. The same OCI may also exist if the participation of the party in question is under a paid contract or is serving voluntarily or pro bono. In fact, allowing vendors to donate their time to aid the State in preparing specifications, requirements, or solicitation documents presents both an OCI and a quid pro quo. For example, a vendor offering his services to assist a department in developing an FSR without charge is not in violation of the law, but clearly poses an OCI when the same vendor later responds to the solicitation.

Recommendations

- Because of the breadth, clarity, and simplicity of the law, the margin for any policy or procedural clarification to positively change its effect is limited to clarifying the application of the rule as written. The best course of action is to revise the law to restrict follow-on work more appropriately linking it to actual conflicts of interest. Specify the law to deal with situations leading to organizational conflicts of interest that are inherent in vendor participation in the pre-solicitation activities. In redrafting this statute, the State ought to make it broadly applicable to all purchasing transactions not limited to consulting services and not limited to instances where the initial work is performed for fee or under a contract. Examples from other government entities are provided in Appendix J. These examples are in keeping with our recommendation and should be considered during implementation.
- With the change in the law due to SB 1467, SAM §5202 must be updated to remove the reference to PCC §10365.5; it is now redundant and potentially confusing due to the included example that applies the rule in a very specific context.
- Develop policy and procedures to clarify the application of the law as it is written and in the case of any future statutory improvements, including specific steps for applying the law in context of the purchasing process and individual purchasing models.

2.4.3 Protests, Disputes, and Grievances Processes

- **FOAM Reference: Finding #20**

Findings

For each type of procurement, the statutes define a protest process by which the State receives, processes, and decides on bidder protests. For goods solicitations, the Victim Compensation and Government Claims Board (VCGCB) (PCC §10306) hears protests. IT goods and services protests are also heard by the VCGCB (PCC §12102).

In accordance with PCC §10345, protests for non-IT services are to be decided by DGS. The Alternative Protest Pilot provides an alternative process with different grounds for protesting utilizing the Office of Administrative Hearings (OAH) for arbitrating the decision (CCR Title 1 Chapter 5).

PCC §12102 directs DGS to develop procedures for processing protests for any formal competitive IT procurement. It also permits "initial" protests of the requirements before bids are submitted.

For goods and services, PCC §10300 states that DGS must provide a Customer and Supplier Advocate for aiding vendors with the protest process.

PCC §12127.5 states:

> All other procurements subject to this chapter shall meet one or more of the following criteria:
>
> (a) The agency or department has stated its business needs and not detailed specification in the solicitation.
>
> (b) The agency or department has stated the criteria and the weight to be given to each criterion by which it will evaluate all proposals.
>
> (c) The contract shall be awarded based on "value effective acquisition," as that term is defined in Section 12100.7, competitive negotiation, an alternative procurement, performance-based solicitations, or other methodologies as established by the Department of General Services.

SAM §5210.2 states:

> Protests involving informal quotations or protests of the procurement document or process prior to selection announcement will be heard and resolved by the Department of General Services.

CAM Chapter 3.48 describes the process for handling initial protests of solicitation requirements.

Within the Historical and Statutory Notes for PCC §10290.1, the legislative intent regarding the protest process is clearly expressed:

> Section 1 of Stats.1995, c. 932 (S.B.910):
>
> b) The integrity of the procurement process, as well as the ability to attract maximum competition, are further enhanced by allowing an aggrieved bidder the right to a timely and equitable process to protest a solicitation, award, or related decision.

The statutes and policies relating to protests, disputes, and the like are spread throughout the universe of codes, regulations, policy manuals, and other sources. This disorganization presents a tremendous challenge to both the buyer and vendor community in effectively utilizing and managing the protest-related processes. In general, there is a lack of clear and detailed policies, procedures, roles and responsibilities that govern the processing of protests, disputes and grievances.

The practice of maintaining various protest hearing and decision bodies is not advantageous. It introduces confusion and opportunity for discrepancies with regard to the processes and the outcomes of protests. This redundancy is not justified.

Recommendations

- Create policies to protect the rights of all respondents to State of California solicitations to have their protests heard and decided. An adjunct process is necessary that provides all bidders with opportunities to be fully debriefed following a solicitation, thereby, reducing the protests occurring simply because an unsuccessful bidder wants to understand the reasons why they lost.
- Create policies with timelines for responding to all protests, questions, disputes, or complaints.
- Create a policy that clearly states under what conditions the Alternative Protest Pilot may be applied and which solicitation methods may be used.
- Create a policy regarding the assignment and roles of the Customer and Supplier Advocate. Additionally, ensure that IT goods and services are addressed within this policy.
- Create procedures to handle the protest process with the following attributes:
  - Integrity of the process with regard to roles and conflicts of interest
  - Chain of custody for the files, documents, and other evidence to avoid losses of information that would affect the outcome
  - Proper and timely routing of protest documents
  - Communications to vendor controlled to protect against improper threats or quid pro quo or other perceived conflicts of interest

- Create policies and processes for handling protests and/or grievances for all procurement mechanisms including informal, CMAS, MSA, and NCBs.
- Modify the PCC to standardize the protest hearing and decision body.
- Modify the PCC to standardize the process for announcing intent to award and the period for accepting protests.
- Modify the PCC to allow for the DGS to find a protest frivolous and require a bond to be posted for the hearing body to decide the protest. Require that the bond be forfeited should the disappointed vendor lose the decision.

2.4.4 Non-Competitive Bid Process

- **FOAM Reference: Finding #22**

Findings

For goods, State law provides the ability to conduct non-competitive bid (NCB) procurements when an individual department and DGS agree that an article of a specified brand or trade name is the only article that will properly meet the needs of the department (see PCC §10301).

For services, PCC §10348 states:

> The department shall prescribe the following:
> (a) The conditions under which a contract may be awarded without competition, and the methods and criteria which shall be used in determining the reasonableness of contract costs when a contract is awarded without competition.

Additionally, PCC §12102(a) states that IT goods and services will be acquired through competition except when DGS determines that "(1) the goods or services proposed for acquisition are the only goods and services which can meet the state's need, or (2) the goods and services are needed in cases of emergency where immediate acquisition is necessary for the protection of the public health, welfare, or safety."

In some cases it may not make sense to conduct competitive procurements if there is only one supplier that can meet the needs of a department. For example, a department purchases a specific brand of postal equipment, including a postal meter. Maintenance on the meter is only available from the original

equipment manufacturer. It does not make sense for the department to be required to competitively bid a maintenance contract where no other supplier could provide support.

An NCB may not be appropriate for procurements that could be responded to by a number of vendors. For example, a department may need to engage a vendor to perform some type of consulting services. In the current market place, there are literally hundreds of vendors that can provide a variety of consulting services, making it much more difficult for a department to adequately justify that an NCB is necessary and appropriate.

The result of poor planning and/or lack of understanding of the definition and appropriate use of the NCB process may result in:

- Inappropriate requests for NCB approval
- DGS being pressured into approving an NCB that might be more appropriately a competitively bid procurement

Recommendations

- Amend the Public Contract Code to define a consistent definition of NCB, and the applicability of the NCB process for goods, services and IT.
- Regardless of the statutory change above, develop standardized policy and procedures that defines the appropriate use of NCB, including all types of NCB (i.e., single-source [specified brand or trade name] and emergency).
- Update the standard form to be used for documenting and requesting approval on an NCB to match the clarified policies and procedures.
- Establish policies and procedures that include standard processing durations (e.g., turn-around time) and visibility into the status of the request to interested parties throughout the NCB approval process
- Include a definition of NCBs and examples of such in the purchasing training.

2.4.5 Negotiation

- **FOAM Reference: Finding #26**

Findings

The Federal Acquisition Regulations (FAR) §15.306(d) defines "negotiation" as follows:

> Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions….

Similarly, the National Contract Management Association (NCMA) provides the following definition:

> A method of contracting that uses either competitive or other-than-competitive proposals and (usually) discussions. It is a flexible process that includes the receipt of proposals from offerors, permits bargaining, and usually affords offerors an opportunity to revise their offers before award of a contract.

The National Association of State Purchasing Officials (NASPO) and the FAR reference negotiation in context of the two prevailing procurement models, competitive and non-competitive. NASPO's position is that the State, as the buyer, must negotiate with the seller when the solicitation is non-competitive. This condition is necessary to ensure that the resulting contract is not too one-sided due to the lack of alternatives afforded by competition. Therefore, the requirement to conduct negotiation should be statutory.

There are two types of negotiations related to when they occur during the solicitation process; these are pre-award and post-award. Pre-award negotiations can be broad and may result in material changes to the scope of the proposals, the price, or the solicitation specifications. Post-award negotiations may not include material changes to the scope or prices because of the fairness principle. To do so would, in effect, change the solicitation ex post facto, thereby opening the possibility that a different contractor could have won if the negotiated terms were solicited. This not only is unfair

NASPO's position is that the State, as the buyer, must negotiate with the seller when the solicitation is non-competitive.

but also may result in a reduced value to the purchasing agency.

Post-award negotiation is important nonetheless because small changes to the terms may be inconsequential to the contractor but significant to the purchasing agency. Both types of negotiation have their place in the California purchasing system. It is also important to note that negotiation is not defined solely in terms of price negotiation. In fact, price may not be as important a factor to State purchasing as is negotiating terms, scope, features, schedule, quality, or some other performance aspect of the contract.

Currently, there is little to no negotiation in California under the following procurement methods:

- Invitation for Bid (IFB) method for goods purchases. The IFB method calls for sealed bid envelopes, which precludes pre-award negotiations once the bids are received. It may be permissible to create policies that allow some pre-bid and post-award negotiations.
- Competitive bidding for non-IT services.
- MSA ordering process. The ordering process is modeled after the sealed proposal/bid method. This is a practice rather than an effect of policy or statute.
- CMAS ordering process. This is a practice rather than an effect of policy or statute.

Negotiation does take place in IT procurements using the compliance phase. The compliance phase is an option for IT IFB procurements and RFP procurements; it is mandatory for multi-step procurements. This process is founded in the concept of negotiation. Currently, only scope and performance oriented aspects of the proposals or bids are negotiated. This is due to a strict interpretation of the policy that calls for cost proposals to be sealed separately and submitted at the final stage of the process after all confidential discussions have occurred. The statutes governing IT procurements do not preclude price negotiations, in fact, PCC §12103 encourages price negotiation by directing DGS to develop policies and procedures for conducting them.

In public agency purchasing, the openness of the process represents a built-in advantage to the contractor in conducting negotiations. They often know the budget, criticality, evaluation criteria, the other contractors involved, and many other attributes of the procurement that would not be disclosed in the private sector. The goal of negotiation is to

arrive at a mutually agreeable contract. It should not be seen as an adversarial process that sets the stage for a contentious relationship during contract execution and delivery.

The process of public agency procurement negotiation must be guided by policies and detailed procedures. This structure is required to preserve the principles of public purchasing, such as openness, fairness, and competition. The negotiation meetings must be highly structured. There must be a fixed number of meetings. There must be well-defined criteria for entering into negotiation.

Care must be taken to ensure that fair and equal treatment is maintained when the negotiation team is dealing with several contractors. The information passed from the negotiation team to the contractors must not represent a comparison among proposals. The negotiation team must be diligent in offering the same type and level of information to each contractor.

Negotiation is a skill that requires proper training and experience. In order to conduct an effective negotiation and obtain all of the "must have" and the most of the "would like to have" aspects of the contract for the most advantageous price, the negotiation team must be confident, assertive, and competent.

Sufficient skill and experience is especially required for the public sector negotiation team, given the built-in disadvantages of this environment. The team must also be careful not to negotiate a contract that strips the value from the delivery of the goods or services in favor of a lower price.

Negotiation is a skill that requires proper training and experience.

Recommendations

- Draft legislation that requires negotiation for non-competitive solicitations.
- Develop comprehensive policies implementing the practice of negotiation that address the following:
  - Preservation of the principles of openness, fairness, and competition.
  - Defining the various types of negotiation and when they may be applied.
  - Specify training and skills needed for the negotiation team members.

- Develop detailed step-by-step procedures to guide the negotiation process including:
  - Planning for negotiation – prior to the start of the procurement, identify if and how negotiation may aid in achieving the specific objectives relating to price, delivery, performance standards, warranty, contractual terms and conditions
  - Including language in the solicitation documents specifying if negotiation will be employed or not and, if so, detailing the negotiation process to be followed
  - Specifying how contractors are selected to enter into negotiations
  - Specifying the possible outcomes and process following the negotiation up to contract award
- Develop a training and certification program that qualifies purchasing officials to conduct negotiations.

Incentive contracts may be of great benefit to the State.

2.4.6 Incentive Contracting

- **FOAM Reference: Finding #28**

Findings

Within California, incentive contracting is used primarily in the public works construction area. The PCC §10226 authorizes incentive contracting for certain public works projects based only on the time of completion. By the rules of legal interpretation, this authorization in statute implies that there is not an authorization for incentive contracting in the procurement of goods, services, or information technology.

Incentive contracts may be of great benefit to the State. They can shift risk to the contractor and increase the value equation for the State while offering the contractor opportunities to increase their compensation and profit. There is a potential for incentive contracts to save money, reduce risk, and increase quality.

Incentives may take the form of extra compensation for achieving positive results or certain desired behavior or compensation reductions for negative performance or behavior. They also may be non-monetary, for example, tying the execution of contract extensions or options to

specific performance metrics on the base contract. The following are examples of incentive contracts:

- Goods – contract stipulates that for consistent delivery of a fresh produce product that meets the highest end of the quality range the payment would be higher, whereas the delivery of product at the low end of the acceptable quality range would yield a lower payment per unit. This incentive insulates the buyer from the quality risk inherent in the fresh produce market.
- Services – contract language calls for incentive payments based on the results of customer satisfaction surveys in the case of an outsourced call-center.
- Information Technology – contract provides positive and negative monetary incentives for quality (number of defects above or below a threshold number) and schedule performance (delivery of milestones prior to certain dates) on a custom software development and integration effort.

Incentive contracts are not without their costs. Additional overhead costs are involved in administration of the incentives. The contract administrator must track and oversee the collection of metrics to support the incentives. The contract administrator must put in place processes for the incentive decisions and payment processes to enforce them. They must also be prepared for any contract disputes that may result from the determination of the amount or applicability of the incentive.

Recommendations

- Draft legislation to specifically allow for incentive contracting in goods, services and information technology procurements.
- Develop policies to provide sound guidance on when incentive contracting should be considered as well as the requirements and impacts on the solicitation, selection, award, and contract administration processes.
- Develop procedures for conducting procurements with incentive contracting.